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No. 06-413

In the Supreme Court of the United States

JEFFREY UTTECHT, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY, PETITIONER

v.

CAL COBURN BROWN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

The United States will address the following question: Whether a court of appeals should give deference to a trial court's decision, based on its in-court observations, to remove a potential juror for cause when the juror states that he could follow the law and impose a capital sentence but expresses uncertainty about the circumstances in which he in fact could do so.

TABLE OF CONTENTS

Page

Interest of the United States 1
Constitutional provision involved 2
Statement 2
Summary of argument 13
Argument:
A reviewing court should give substantial deference to a trial court's dismissal of a prospective capital juror for cause where the juror asserts that he could follow the law and impose a capital sentence but expresses uncertainty about the circumstances in which he could do so 15
A. Determinations about juror bias based on credibility assessments fall uniquely within the trial court's province 16
B. The trial court's decision in this case to dismiss juror Deal for cause warrants deference and should be sustained 19
1. Juror Deal expressed uncertainty concerning whether he could impose a capital sentence when there is no possibility that the defendant could be released and again commit murder 19
2. The court of appeals erred in requiring the trial court to give conclusive weight to Deal's statements that he could follow the law and impose a capital sentence 23
Conclusion 30

TABLE OF AUTHORITIES

Cases:

Anderson v. *City of Bessemer City*, 470 U.S. 564 (1985) 26

Cases—Continued: Page

Darden v. *Wainwright*, 477 U.S. 168 (1986) 17, 24
Gomez v. *United States*, 490 U.S. 858 (1989) 26
Gray v. *Mississippi*, 481 U.S. 648 (1987) 28, 29
Morgan v. *Illinois*, 504 U.S. 719 (1992) 25
Patton v. *Yount*, 467 U.S. 1025 (1984) 16, 26, 29
Reynolds v. *United States*, 98 U.S. 145 (1878) 16, 26
Thompson v. *Keohane*, 516 U.S. 99 (1999) 16
United States v. *Barnette*, 211 F.3d 803 (4th Cir. 2000) 2
United States v. *Brown*, 441 F.3d 1330 (11th Cir. 2006), cert. denied, 127 S. Ct. 1149 (2007) 2
United States v. *Fulks*, 454 F.3d 410 (4th Cir. 2006), petition for cert. pending, No. 06-9232 (filed Jan. 19, 2007) 2
United States v. *Purkey*, 428 F.3d 738 (8th Cir. 2005), cert. denied, 127 S. Ct. 433 (2006) 2
United States v. *Webster*, 162 F.3d 308 (5th Cir. 1998), cert. denied, 528 U.S. 829 (1999) 2
Wainwright v. *Witt*, 469 U.S. 412 (1985) ..... *passim*
Witherspoon v. *Illinois*, 391 U.S. 510 (1968) 17

Constitution and statutes:

U.S. Const. Amend. VI 2, 15
28 U.S.C. 2254 1
28 U.S.C. 2254(d)(1) 11

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INTEREST OF THE UNITED STATES

This case raises the question whether a court of appeals should give deference to a trial court's decision, based on its in-court observations, to remove a potential juror for cause when the juror states that he could follow the law and impose a capital sentence but expresses uncertainty about the circumstances in which he in fact could do so. While the case comes to this Court in a federal habeas challenge to a state conviction under 28 U.S.C. 2254, and thus implicates questions concerning the standards of review in that context, comparable issues of deference to a finding of juror bias arise on direct review. Cf. *Wainwright* v. *Witt*, 469 U.S. 412, 428 (1985) (noting that trial court findings about juror bias are "entitled to deference even on direct review"). Accordingly, a trial court's ability to remove a potential capital juror for cause, even where the juror indicates an

ability to impose capital punishment, and a reviewing court's obligation to give deference to a trial court's credibility assessments in that process, implicate issues that arise in federal capital trials and on appellate review of federal capital convictions.[1] The United States therefore has a substantial interest in the Court's resolution of this case.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution states that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."

STATEMENT

1. On May 23, 1991, respondent forcibly entered Holly C. Washa's automobile in the parking lot of a hotel near the Seattle-Tacoma Airport and demanded at knife-point that she "drive or die." Respondent later forced Washa into the passenger seat, tied her hands behind her back, and drove her to his motel. In his motel room, respondent forced Washa to remove her clothes, tied her to the bed, and raped and physically abused her repeatedly over the course of several hours. The following day, respondent again tied Washa to the bed and sexually assaulted her with a bottle, and he also shocked her with an electric extension cord. That eve-

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[1] See, *e.g. United States* v. *Fulks*, 454 F.3d 410, 427-430 (4th Cir. 2006), petition for cert. pending, No. 06-9232 (filed Jan. 19, 2007); *United States* v. *Brown*, 441 F.3d 1330, 1356-1357 (11th Cir. 2006), cert. denied, 127 S. Ct. 1149 (2007); *United States* v. *Purkey*, 428 F.3d 738, 750-751 (8th Cir. 2005), cert. denied, 127 S. Ct. 433 (2006); *United States* v. *Barnette*, 211 F.3d 803, 812 (4th Cir. 2000); *United States* v. *Webster*, 162 F.3d 308, 340-341 (5th Cir. 1998), cert. denied, 528 U.S. 829 (1999).

ning, respondent left for the Seattle-Tacoma Airport to take a flight to California to meet Susan J. Schnell, with whom he had made weekend plans. Before driving Washa's car to the airport, respondent forced Washa into the trunk of the car, cut her throat and stabbed her repeatedly, and left her in the trunk to bleed to death. Several days later, Washa's body was found in the trunk of her car. Pet. App. 5a-6a, 97a-101a. 103a.

Respondent then flew to Palm Springs, California, to meet Schnell, whom he had recently met on an airplane. On May 25, 1991, respondent and Schnell checked into a hotel in Palm Springs. The following evening, while in their hotel room, respondent slit Schnell's throat with a knife, tied her to the bed, and raped her. Schnell managed to call the hotel desk clerk for help while respondent was out of the room. Officers arrived, obtained a description of respondent from Schnell, and arrested respondent in the hotel parking lot. Pet. App. 6a, 101a-102a.

Respondent then made recorded statements to police detectives in which he confessed to the rape and murder of Washa in Seattle as well as the rape and attempted murder of Schnell in Palm Springs. Respondent subsequently pleaded guilty in California to the attempted murder of Schnell, and to aggravated mayhem, torture, robbery, and false imprisonment. He was sentenced to life imprisonment for those crimes. Pet. App. 6a, 103a.

2. On June 11, 1991, respondent was charged in Washington with aggravated first-degree murder in connection with Washa's murder. The State sought to have a jury impose a sentence of death. Pet. App. 104a-105a.

a. On October 25, 1993, the trial court began jury selection. Pet. App. 105a. Prospective jurors completed a questionnaire that included questions about capital

punishment, and certain prospective jurors were questioned individually in court. See Pet. 6; Pet. App. 228a-229a, 235a. On November 3, 1993, the trial court and counsel for both sides questioned prospective juror Richard Deal. *Id.* at 222a-242a; see *id.* at 173a. Deal had stated in his responses to the questionnaire that he was in favor of capital punishment if it were proved beyond a shadow of a doubt that the defendant had killed and would kill again. *Id.* at 235a; see *id.* at 228a.

Respondent's counsel questioned Deal initially. After explaining to Deal that jurors in the penalty phase "consider whether or not the death penalty should be imposed or whether or not a life sentence without parole should be imposed," Pet. App. 227a, counsel stated:

> Q One sort of aside here, life without parole is exactly what i[t] sounds like. It is a life sentence. You're not ever eligible for parole. You hear about it in the papers sometimes where somebody has got a life sentence and they're going to be eligible for parole in 10 years or 20 years.
>
> A I understand.
>
> Q Were you aware before that Washington has got this kind of sentence where it[]s life without parole where you are not ever eligible for parole?
>
> A I did not until this afternoon.
>
> Q That is the two options that the jury has if they found the person guilty of premeditated murder beyond a reasonable doubt plus aggravating circumstances beyond a reasonable doubt.
>
> Do you think that you could consider both options?

A Yes, I could.

Q Could you give me an idea sort of have you thought about sort of the underlying reason why you think the death penalty is appropriate, what purpose it serves, that kind of thing?

A I think if a person is, would be incorrigible and would reviolate if released, I think that's the type of situation that would be appropriate.

Id. at 227a-228a.

In light of Deal's statement that "the type of situation that [a capital sentence] would be appropriate" is if the defendant "would reviolate if released," Pet. App. 228a, respondent's counsel attempted to explain to Deal once again that there was no possibility that a defendant convicted of a capital crime could be released on parole:

Q Okay. Now, knowing that you didn't know before when you were coming to those opinions about the two options that we have here obviously somebody who is not going to get out of jail no matter which sentence you give them if you got to that point of making a decision about the sentence, does that mean what I'm hearing you say is that you could consider either alternative?

A I believe so, yes.

Q Now, in your, I think in your questionnaire you sort of referred to that also, what you kind of thought about was if somebody had been killed and it had been proven to you that they would kill again. Understanding that the two options there are life without parole or the death penalty, there is not a lot of likelihood that people are going to spend a lot of time talking about whether or not

they're going to kill again in the sentencing phase of this case. Is that going to make you frustrated? Are you going to want to hear about things like that, about people's opinions in the penalty phase?

A I'm not sure.

Id. at 228a-229a. Counsel then turned to more general questions about "the frequency of the use of the death penalty in the United States today." *Id.* at 229a. Deal stated that "I think in severe situations it is appropriate." *Ibid.*

After respondent's counsel completed her questions, counsel for the State questioned Deal. Following introductory questions, counsel asked Deal about his statement on the jury questionnaire "that you're in favor of the death penalty if it is proved beyond a shadow of a doubt if a person has killed and would kill again." Pet. App. 235a.

Q * * * Do you remember making that statement?

A Yes.

* * * * *

Q Now, you made this statement before you read your juror's handbook I imagine?

A Yes.

Q So, I want to ask you, the thing that bothers me, of course, is the idea beyond a shadow of a doubt. The law says beyond a reasonable doubt, and it will be explained to you what it actually means. But I want to assure you it doesn't mean, I don't believe the Court would instruct would you it means beyond all doubt or beyond any shadow of

a doubt. Knowing that, would you still require the State to prove beyond a shadow of a doubt that the crime occurred knowing that the law doesn't require that much of us?

A I would have to know the, I'm at a loss for the words here.

Q You can ask me any questions, too, if you need some clarification.

A I guess it would have to be in my mind very obvious that the person would reoffend.

Q Well, we're not talking about that, sir.

Id. at 235a-236a. Counsel subsequently asked whether Deal "would be satisfied with a reasonable doubt standard? You would be willing to follow the law?" *Id.* at 236a. Deal answered, "Yes." *Id.* at 237a.

Counsel then questioned Deal concerning his statements that the likelihood that the defendant would kill again would bear materially on his consideration of a capital sentence:

Q Now, you mentioned that you would have to be satisfied that the person would not kill again. Now, you know that the possible, that the only two penalties are life in prison without parole or death. The person, if he is committed, if he is convicted of aggravated murder, is not going to be out on the streets again, not going to come into contact with the people that he had a chance to run into before. So, the likelihood of him killing someone out in the street is nil or practically nil at that point.

I guess the reverse side of what you're saying is, if you could be convinced that he wouldn't kill

again, would you find it difficult to vote for the death penalty given a situation where he couldn't kill again?

A I think I made that statement more under the assumption that a person could be paroled. And it wasn't until today that I became aware that we had a life without parole in the state of Washington.

Q And now that you know there is such a thing and they do mean what they say, can you think of a time when you would be willing to impose a death penalty since the person would be locked up for the rest of his life?

A I would have to give that some thought. I really, like I said, up until an hour ago did not realize that there was an option of life without parole.

Pet. App. 237a-238a.

After stating that he "realize[d] this is put on you rather suddenly," counsel for the State again reiterated "that the person would never get out for the rest of his life." Pet. App. 238a. Counsel asked Deal, "could you consider" imposing the death penalty, "and if you could consider it, do you think under the conditions where the man would never get out again you could impose it?" *Id.* at 238a-239a. Deal responded, "Yes, sir," *id.* at 239a, and counsel continued as follows:

Q So, this idea of him having to kill again to deserve the death penalty is something that you are not firm on, you don't feel that now?

A I do feel that way if parole is an option, without parole as an option. I believe in the death penalty. Like I said, I'm not sure that there should

be a waiting line of people happening every day or every week even, but I think in severe situations it[ ]s an appropriate measure.

Q But in the situation where a person is locked up for the rest of his life and there is no chance of him ever getting out again, which would be the situation in this case, do you think you could also consider and vote for the death penalty under those circumstances?

A I could consider it, yes.

Q Then could you impose it?

A I could if I was convinced that was the appropriate measure.

Ibid. At that point, counsel stated that he had no further questions for Deal. *Id.* at 240a.

The trial judge excused Deal and asked whether either counsel wished to raise a challenge to Deal. Pet. App. 241a. Counsel for the State responded affirmatively, explaining:

I think he is very confused about the statements where he said that if a person can't kill again, in other words, he's locked up for the rest of his life, he said, basically, he could vote for the death penalty if it was proved beyond a shadow of. And I am certainly going to concede that he means beyond a reasonable doubt. And if a person kills and will kill again. And I think he has some real problems with that. He said he hadn't really thought about it. And I don't think at this period of time he's had an opportunity to think about it, and I don't think he said anything that overcame this idea of he must kill again

> before he imposed the death penalty or be in a position to kill again. So, that is my only challenge.

Id. at 241a-242a. Respondent's counsel responded, "[w]e have no objection." *Id.* at 242a. The trial court then removed Deal for cause, stating, "Counsel, the request of the prosecutor's office, we will go ahead and excuse Mr. Deal." *Ibid.*

b. On December 10, 1993, the jury found respondent guilty of aggravated first-degree murder. Pet. App. 105a. On December 15, 1993, the penalty phase proceedings began, at the close of which respondent was sentenced to death. *Ibid.*

3. The Supreme Court of Washington affirmed respondent's conviction and sentence. Pet. App. 92a-221a. The court rejected respondent's argument that the trial court had abused its discretion in excusing Deal for cause. The court explained that the "standard for ruling on challenges for cause in a death penalty case is whether the prospective juror's views would prevent or substantially impair the performance of that person's duties as a juror." *Id.* at 171a (citing, *inter alia*, *Wainwright* v. *Witt*, 469 U.S. 412, 424 (1985)). The court observed that it gave "deference to the trial court's finding that a prospective juror's views on the death penalty will prevent that person from trying the case fairly and impartially," because the "trial judge is in the best position upon observation of the juror's demeanor to evaluate the responses and determine if the juror would be impartial." *Ibid.*

Applying those standards, the court found no abuse of discretion in the trial court's dismissal of Deal. After observing that respondent had not objected to the State's challenge of Deal, the court explained that, "[o]n voir dire [Deal] indicated he would impose the death

penalty where the defendant 'would reviolate if released,' which is not a correct statement of the law." Pet. App. 173a. The court also noted that Deal "misunderstood the State's burden of proof in a criminal case and understood it to be 'beyond a shadow of a doubt,' although he was corrected later." *Ibid.* The court concluded that the "trial court properly exercised its discretion in excusing [Deal] for cause," because his "views would have prevented or substantially impaired [his] ability to follow the court's instructions and abide by [his] oath[] as juror[]." *Id.* at 208a.

4. Respondent filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Washington. Pet. App. 43a. The district court denied respondent habeas relief. *Id.* at 43a-91a. In rejecting respondent's arguments concerning the removal of Deal for cause, the court observed that Deal had "indicated some confusion about the impact of a life sentence without parole and the standard of proof" by stating "that he would only impose the death penalty if someone could kill again on parole, and that the standard of proof was 'beyond a shadow of a doubt' rather than 'beyond a reasonable doubt.'" *Id.* at 77a-78a. The court found that there was "sufficient evidence to establish that [Deal's] views would 'prevent or substantially impair' his * * * ability to carry out the duties imposed on jurors." *Id.* at 79a.

5. The court of appeals reversed. Pet. App. 1a-19a. It held that respondent was entitled to habeas relief on his claim that the trial court had erred in removing Deal for cause, because the removal was "directly contrary to Supreme Court precedent." *Id.* at 19a (citing 28 U.S.C. 2254(d)(1)).

a. The court of appeals emphasized that Deal had "stated unequivocally that he could consider the death penalty as an option if told to do so," Pet. App. 10a, and that, "[m]ost importantly, he promised he would 'follow the law' without reservation," *id.* at 11a. In the court of appeals' view, any finding that Deal was impaired in his ability to follow the law would have been unreasonable on the record because Deal had "ultimately stated that [he] could consider the death penalty in an appropriate case." *Id.* at 13a (brackets in original).

With respect to Deal's statements indicating that it would be significant to him whether a defendant could kill again, the court determined that those statements "did not exclude the possibility that [he] would vote to impose the death penalty in other circumstances as well." Pet. App. 14a. The court further explained that, while it "owe[d] the trial judge deference because of his ability to observe demeanor," "demeanor can only shed light on ambiguous language; it cannot contradict the witness's clear words." *Id.* at 17a n.8. In the court's view, Deal's "clear words were that he could impose the death penalty and would follow the [trial] court's instructions; he never said anything to the contrary." *Ibid*; see *id.* at 21a n.10.

b. Judge Tallman, joined by four other judges, dissented from the denial of rehearing en banc. Pet. App. 23a-41a. Judge Tallman explained that Deal had "stated several times that his ability to impose the death penalty was dependent on whether the defendant was likely to re-offend." *Id.* at 28a-29a. And although Deal had also made statements indicating a willingness to impose a capital sentence, those statements were "accompanied by his indecisiveness and an expressed viewpoint" concerning the significance of whether the defendant might

kill again, "which, if followed, would result in the misapplication of Washington law." *Id.* at 37a. Judge Tallman noted that respondent's counsel had raised no objection to Deal's dismissal for cause, which indicated that "those who had the opportunity to watch [Deal's] testimony * * * felt that [he] was properly dismissed." *Id.* at 33a. In Judge Tallman's view, "[a]lthough some might find that [Deal] had eschewed and rejected his prior improper basis for application of the death penalty, a reasonable mind could just as easily find that he *had not* eschewed and rejected that basis." *Id.* at 37a. Judge Tallman thus concluded that the trial court's removal of Deal was "a reasonable judgment call made by the only judge who actually saw and heard [Deal] during voire dire." *Id.* at 28a.

SUMMARY OF ARGUMENT

A "prospective juror may be excluded for cause because of his * * * views on capital punishment" if "the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright* v. *Witt*, 469 U.S. 412, 424 (1985) (internal quotation marks omitted). As this Court has emphasized, a reviewing court must accord substantial deference to a trial court's determination of whether to dismiss a prospective juror for cause under that standard. Determinations of juror bias turn on an assessment of the juror's credibility, and the trial court is uniquely positioned to assess the juror's credibility by viewing the juror's demeanor and hearing the juror's testimony. Moreover, the costs of overturning the trial court's assessment on appeal after a trial with an unbiased replacement juror are substantial.

In this case, the trial court reasonably determined that prospective juror Deal's views on capital punishment warranted his dismissal for cause, and the trial court's determination should have been sustained by the court of appeals (as it was indeed sustained by the Washington Supreme Court). Notwithstanding repeated efforts by counsel on both sides to explain to Deal that a defendant convicted of a capital crime under Washington law would have no possibility of release if spared a capital sentence, Deal indicated on several occasions that he would view the likelihood that a defendant would be released and commit murder again as a central consideration when assessing whether imposition of a capital sentence would be warranted. In that context, the trial court had ample basis for concluding that Deal's views on capital punishment would prevent or substantially impair his ability to adhere faithfully to applicable capital sentencing standards.

In holding that the trial court was barred from dismissing Deal for cause, and was so clearly barred that its action contradicted clearly established precedent of this Court, the court of appeals relied on Deal's affirmative answer of "Yes" on certain occasions when asked if he could follow the law and consider imposing a capital sentence. The court of appeals' approach is fundamentally misconceived. A trial court is not required to attach conclusive weight to a prospective juror's generic assertions that he will be able to follow the law. Such statements must be considered in context, and here, Deal's affirmative replies when asked if he could follow the law were surrounded by repeated indications that he would give pivotal weight to whether the defendant could be released and kill again.

Equally fundamentally, the trial court heard Deal's testimony and viewed his demeanor. The trial court thus was best situated to weigh Deal's assertions that he could follow the law against other statements he made during voir dire casting doubt on that assertion, and to evaluate which of those sets of responses would more likely shape Deal's performance of his functions as a juror. The absence of any objection by respondent to Deal's removal for cause reinforces the need to defer to the trial court, as it suggests that those who directly observed Deal's testimony were in agreement that it raised substantial questions about his ability to serve as an impartial juror in this case.

ARGUMENT

A REVIEWING COURT SHOULD GIVE SUBSTANTIAL DEFERENCE TO A TRIAL COURT'S DISMISSAL OF A PROSPECTIVE CAPITAL JUROR FOR CAUSE WHERE THE JUROR ASSERTS THAT HE COULD FOLLOW THE LAW AND IMPOSE A CAPITAL SENTENCE BUT EXPRESSES UNCERTAINTY ABOUT THE CIRCUMSTANCES IN WHICH HE COULD DO SO

This Court has long recognized that protection of a defendant's right to an "impartial jury," U.S. Const. Amend. VI, requires delicate determinations about juror bias that are uniquely suited for determination by the trial court. In a capital case, a judge must determine whether, whatever words the juror may speak about his ability to impose a death sentence, the juror's mind is in fact open to assessment of the facts under the correct legal standard. The court of appeals erred in this case in declining to apply principles of deferential review to the trial court's juror-bias determination and in refusing to allow a judge to remove a juror absent the juror's

express acknowledgment that he or she would be unable to follow the law.

A. Determinations About Juror Bias Based On Credibility Assessments Fall Uniquely Within The Trial Court's Province

1. As a means of enforcing the Sixth Amendment right to trial by an impartial jury, the Court has long endorsed a defendant's right to challenge a prospective juror for cause on the ground that the "juror has formed an opinion as to [an] issue to be tried." *Reynolds* v. *United States*, 98 U.S. 145, 155 (1878). The Court also has long made clear, as a corollary principle, that the "finding of the trial court upon that issue ought not to be set aside by a reviewing court, unless the error is manifest." *Id.* at 156; see *Patton* v. *Yount*, 467 U.S. 1025, 1036-1038 (1984).

A reviewing court owes substantial deference to a trial court's determination concerning whether a potential juror should be dismissed for bias because "the manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words." *Reynolds*, 98 U.S. at 156-157. While the "manner of the juror" is "seen below," it "cannot always be spread upon the record. Care should, therefore, be taken in the reviewing court not to reverse the ruling below upon such a question of fact, except in a clear case." *Id.* at 157. A trial court's determination on juror bias "is essentially one of credibility, and therefore largely one of demeanor. As [the Court has] said on numerous occasions, the trial court's resolution of such questions is entitled, even on direct appeal, to special deference." *Patton*, 467 U.S. at 1038 (internal quotation marks omitted); accord *Thompson* v. *Keohane*, 516 U.S.

99, 111 (1995) (explaining that determinations concerning "juror impartiality" depend "heavily on the trial court's appraisal of witness credibility and demeanor," and the trial court therefore "is better positioned to make decisions of this genre").

2. Those principles are fully applicable to a trial court's determination in a capital case on whether a potential juror should be dismissed for cause based on his or her views about capital punishment. The Court first addressed the issue in *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968), holding that the defendant's right to an impartial jury had been infringed by application of an Illinois statute that allowed the dismissal of "any veniremen who expressed qualms about capital punishment." *Id.* at 513. The Court explained that a "man who opposes the death penalty" nonetheless "can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror." *Id.* at 519. Accordingly, the Court held, "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Id.* at 522.

Subsequently, in *Wainwright* v. *Witt*, 469 U.S. 412 (1985), the Court "clarif[ied] [its] decision in *Witherspoon*" and elaborated on "the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment." *Id.* at 424. "That standard," the Court established, "is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Ibid.* (internal quotation marks omitted); *Darden* v.

Wainwright, 477 U.S. 168, 175 (1986). The Court explained that the standard "does not require that a juror's bias be proved with 'unmistakable clarity.'" *Witt*, 469 U.S. at 424.

> This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear'; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings.

Id. at 424-425.

The Court emphasized that, as is generally the case with respect to review of a trial court's determinations on juror bias, see pp. 16-17, *supra*, review of such determinations in the context of a capital case requires according considerable deference to the trial court. As the court explained, "[d]espite [a] lack of clarity in the printed record" concerning whether a juror's views on capital punishment would impair his or her ability to impose a capital sentence consistent with the law, "there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." 469 U.S. at 425-426. And because the "predominant function in determining juror bias involves credibility findings whose basis cannot be easily discerned from an appellate record," *id.* at 429, "deference must be paid to the trial judge who sees and hears the juror," *id.* at 426. The case for deference is particularly strong (and the costs of reversal particularly high) in a case like this where

the trial court has *granted* a motion to strike for cause, because there is no risk that a biased juror will actually sit.

B. The Trial Court's Decision In This Case To Dismiss Juror Deal For Cause Warrants Deference And Should Be Sustained

The record in this case supports the trial court's dismissal of juror Deal. The juror's responses, when he was apprised that Washington state law precluded the possibility of respondent's release, evinced sufficient uncertainty about the circumstances in which he could impose a death sentence that a trial court could reasonably find him unqualified to serve. And the court of appeals' conclusion, based only on a paper record, that the juror's statements that he could follow the law precluded his dismissal overlooked the full context of the juror's responses and ignored the trial court's superior ability to evaluate the juror's demeanor and credibility.

1. Juror Deal expressed uncertainty concerning whether he could impose a capital sentence when there is no possibility that the defendant could be released and again commit murder

In his responses to the jury questionnaire completed by prospective jurors, juror Deal stated that a capital sentence would be appropriate if it were proved that the defendant "has killed and would kill again." Pet. App. 235a. After Deal's voir dire, the prosecutor explained that the basis for his challenge to Deal was that he did not "think [Deal] said anything that overcame this idea of he must kill again before he imposed the death penalty or be in a position to kill again." *Id.* at 242a. The prosecutor believed that Deal "has some real problems with that," "is very confused," and "hadn't really

thought about" imposition of a capital sentence "if a person can't kill again" and "he's locked up for the rest of his life." *Id.* at 241a. Deal's statements in voir dire fully justified the trial court's decision to dismiss Deal for cause for the reasons explained by the prosecutor.

Deal's initial response on the questionnaire raised substantial questions about his fitness to serve, suggesting that he might view a capital sentence as appropriate only in circumstances that could not arise under state law, *i.e.*, if the defendant were released and might again commit murder. When initially advised by respondent's counsel that a capital defendant is "not ever eligible for parole," Deal responded, "I understand," and acknowledged that he was unaware "until this afternoon" that there would be no possibility of parole. Pet. App. 227a. But Deal stated almost immediately thereafter that "the type of situation" in which a capital sentence "would be appropriate" is if the defendant were "incorrigible and would reviolate if released." *Id.* at 228a. And when counsel then asked whether Deal would be "frustrated" that, in light of the absence of possibility of parole, "there is not a lot of likelihood that people are going to spend a lot of time talking about whether they're going to kill again," Deal responded, "I'm not sure." *Id.* at 228a-229a.

Deal expressed similar confusion and uncertainty when questioned by counsel for the State. When asked if he would "require the State to prove beyond a shadow of a doubt that the crime occurred knowing that the law" requires only proof beyond a reasonable doubt, Deal observed, "I guess it would have to be in my mind very obvious that the person would reoffend." Pet. App. 236a. The prosecutor later asked whether Deal would "find it difficult to vote for the death penalty given a

situation where he couldn't kill again," and Deal responded that "it wasn't until today that I became aware that we had a life without parole in the state of Washington." *Id.* at 238a. The prosecutor followed up by asking if Deal could "think of a time when you would be willing to impose a death penalty since the person would be locked up for the rest of his life." *Ibid.* Deal answered that he "would have to give that some thought. I really, like I said, up until an hour ago did not realize that there was an option of life without parole." *Ibid.* Later, Deal observed that, if "parole is an option," he continued to believe in the "idea of him having to kill again to deserve the death penalty." *Id.* at 239a.

The upshot is that, throughout his voir dire examination, and notwithstanding repeated efforts by counsel on both sides to reiterate that the alternative to a capital sentence was a sentence of life with no possibility of parole, Deal continued to give indications that he would view the likelihood that a defendant could be released and commit another murder as a central—and perhaps the dispositive—consideration in deciding whether a capital sentence would be justified. Because Washington does not allow for release on parole of a person convicted of a capital crime, and because questions concerning whether the defendant might be released and kill again play no role under Washington law in the decision whether to impose a capital sentence, Deal's voir dire responses fully supported concluding that his "views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Witt*, 469 U.S. at 424 (internal quotation marks omitted).

It is true that, as the court of appeals observed, Deal never directly "stat[ed] that he might not be able" to

"follow the law and impose the death penalty" Pet. App. 10a n.5. But "determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism," and a juror's bias therefore need not "be proved with 'unmistakable clarity.'" *Witt*, 469 U.S. at 424. Indeed, "many veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear.'" *Id.* at 424-425; see *id.* at 425 ("veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings"). The trial judge in this case, who was in a position to hear Deal's responses and to observe his demeanor during his voir dire, had ample basis to agree with the prosecutor that Deal had not "overc[o]me this idea of he must kill again before he imposed the death penalty or be in a position to kill again." Pet. App. 242a.[2]

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[2] As respondent acknowledges, it is immaterial that the trial court neither gave a separate explanation setting forth its reasons for dismissing Deal nor made an explicit statement to the effect that Deal would be substantially impaired in his ability to follow the law. See Br. in Opp. 13 ("The trial court is not obligated to make a specific finding that the juror was substantially impaired so long as there is a basis in the record for drawing such a conclusion."). This Court has "decline[d] to require the judge to write out in a separate memorandum his specific findings on each juror excused," or "to announce for the record his conclusions that [a juror] was biased, or his reasoning," where the "finding is evident from the record." *Witt*, 469 U.S. at 430. Here, the prosecutor explained the basis for his challenge to Deal for cause, and the trial court may be presumed to have agreed with that basis when sustaining the prosecutor's challenge. See Pet. App. 241a-242a. That is especially the case in light of the statement of respondent's counsel that she had no objection to Deal's dismissal for cause, *id.* at 242a, which reinforced to the trial court that there was no need to elaborate further on

2. The court of appeals erred in requiring the trial court to give conclusive weight to Deal's statements that he could follow the law and impose a capital sentence

In concluding that the trial court was barred from dismissing juror Deal for cause, the court of appeals relied on certain of Deal's responses stating that he could follow the law and could consider imposing a capital sentence. The court of appeals' approach fails to consider those discrete responses in the context of Deal's voir dire as a whole, and fails to accord due weight to the trial court's firsthand ability to assess Deal's credibility and demeanor.

a. The court of appeals overturned the trial court's removal of Deal for cause, finding it "directly contrary to Supreme Court precedent," principally on the ground that Deal had responded on several occasions "that he could consider the death penalty as an option if told to do so." Pet. App. 10a, 19a; see *id.* at 13a-19a & nn.7, 10. The court emphasized that Deal "stated *six times* that he could follow the law and impose the death penalty." *Id.* at 10a n.5. "Most importantly," the court explained, Deal "promised he would 'follow the law' without reservation." *Id.* at 11a.

An approach that attaches conclusive weight to a juror's generic assertions of an ability to follow the law is fundamentally flawed. Neither a prosecutor nor a defense counsel seeking to determine whether there is cause to strike would limit the inquiry a single question about the juror's willingness to follow the law. The context matters. This Court accordingly has made clear that the "inquiry does not end with a mechanical recita-

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the reasons for sustaining the prosecutor's challenge. See *Witt*, 469 U.S. at 430-431.

tion of a single question and answer," but turns on the full "context surrounding [the juror's] exclusion to determine whether the trial court's decision that [the juror's] beliefs would 'substantially impair the performance of his duties as a juror' was fairly supported by the record." *Darden*, 477 U.S. at 176. The trial judge in this case adhered to those principles, explaining that there "is not any one particular response from any one of these jurors I think that is definitive for the most part. It[ ]s more of a total overall impression from everything that they have said." Pet. App. 35a.

From that perspective, although Deal gave affirmative replies when asked if he could consider imposing a capital sentence and follow the law, see Pet. App. 10a n.5, those responses were interspersed among repeated indications that he would attach substantial significance to whether "the person would reoffend." *Id.* at 236a; see pp. 20-21, *supra*. While the Ninth Circuit emphasized that Deal repeatedly stated that he could follow the law, see *id.* at 10a n.5, the court essentially ignored the intervening statements and confusion that led both the prosecutor and defense counsel repeatedly to seek that assurance.

For instance, immediately after answering, "Yes, I could," when asked if he "could consider both options" of a sentence of death and life imprisonment without parole, Deal stated that "the type of situation [in which a capital sentence] would be appropriate" is if the defendant "would reviolate if released." Pet. App. 228a. And although he likewise responded, "Yes, sir," when questioned if he could impose a capital sentence "where the man would never get out again," *id.* at 239a, that answer came directly after he was asked if he could "think of a time when you would be willing to impose a death pen-

alty since the person would be locked up for the rest of his life," and he acknowledged that he "would have to give that some thought." *Id.* at 238a. Indeed, the response that the court of appeals considered to be the "[m]ost important[]," *id.* at 11a—*i.e.*, Deal's answer of "Yes" when asked if he "would be willing to follow the law," *id.* at 236a-237a—pertained solely to his ability to abide by the reasonable-doubt standard, and thus shed no light on his ability fairly to consider a capital sentence where there is no possibility that the defendant could be released and murder again. *Id.* at 236a ("So, you would be satisfied with a reasonable doubt standard? You would be willing to follow the law?").[3]

b. The court of appeals not only focused unduly on Deal's answers of "Yes" when asked if he could follow the law, without accounting for the context of his statements as a whole, but the court also believed that those responses justified discounting entirely the trial judge's

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[3] In any event, a general assertion of an ability to "follow the law," if accepted at face value, would often fail to account for particular biases that a juror may possess. For instance, the Court in *Witt* recounted the following colloquy between a trial judge and prospective juror:

> THE COURT: Will you follow the law that I give you?
>
> [A]: I could do that.
>
> THE COURT: What I am concerned about is that you indicated that you have a state of mind that might make you be unable to follow the law of this State.
>
> [A]: I could not bring back a death penalty.
>
> THE COURT: Step down.

Witt, 469 U.S. at 432 n.12 (brackets in original); see *Morgan* v. *Illinois*, 504 U.S. 719, 735 n.9 (1992) ("That certain prospective jurors maintain such inconsistent beliefs—that they can follow the law, but that they will always vote to impose death for conviction of a capital offense—has been demonstrated, even in this case.").

superior vantage point from which to assess Deal's credibility. See Pet. App. 17a n.7 ("but demeanor can only shed light on ambiguous language; it cannot contradict the witness's clear words"). Words that seem clear to a reviewing court when read on a transcript, however, may be seen in a different light by the trial judge who see and hears the testimony firsthand. See *Reynolds*, 98 U.S. at 156-157 ("[T]he manner of the juror while testifying is oftentimes more indicative of the real character of his opinion then his words. That is seen below, but cannot always be spread upon the record."); accord *Gomez* v. *United States*, 490 U.S. 858, 875 (1989) (The trial court "must scrutinize not only spoken words but also gestures and attitudes of all participants to ensure the jury's impartiality. But only words can be preserved for review; no transcript can recapture the atmosphere of *voir dire*.") (citations omitted).

The basis for deferring to a trial judge's credibility assessments is especially compelling in the circumstances of this case. Where, as here, a prospective juror gives certain responses that assert an ability to remain impartial but gives other responses that call his or her partiality into question, "only the trial judge could tell which of [the] answers was said with the greatest comprehension and certainty." *Patton*, 467 U.S. at 1040; see *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 575 (1985) ("[O]nly the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said."). There is thus all the more reason here to abide by the settled understanding that "the trial court's resolution of such questions is entitled, even on direct appeal, to special deference." *Patton*, 467 U.S. at 1038 (internal quotation marks omitted).

The need to pay deference to the trial court's assessment of Deal's ability to apply the law faithfully is reinforced by the absence of any objection by respondent's counsel to the removal of Deal for cause. See Pet. App. 242a. As this Court observed in rejecting a claim of improper exclusion of a potential capital juror in *Witt*, "counsel's failure to speak in a situation later claimed to be so rife with ambiguity as to constitute constitutional error is a circumstance [this Court] feel[s] justified in considering when assessing [the defendant's] claims." 469 U.S. at 431 n.11. Respondent's counsel had asked the trial court to reconsider the dismissal of at least one other prospective juror on the basis that the juror's bias had not been sufficiently shown. See Pet. App. 32a. Counsel's acquiescence in Deal's dismissal suggests that those who directly witnessed his voir dire were in agreement about his capacity to serve as an impartial juror. See *Witt*, 469 U.S. at 435 ("Indeed, from what appears on the record it seems that at the time Colby was excused no one in the courtroom questioned the fact that her beliefs prevented her from sitting. The reasons for this, although not crystal clear from the printed record, may well have been readily apparent to those viewing Colby as she answered the questions.").[4]

The court of appeals asserted that according deference to the trial court's conclusions on this record would

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[4] The court of appeals speculated that "the realities of the courtroom" support the view that defense counsel himself must have objected to Deal's pro-capital views and "thanked his lucky stars when the prosecutor bumped [Deal]." Pet. App. 18a-19a n.9. Nothing supports that attribution of views to respondent's trial counsel, however, other than the court of appeals' surmise. And to the extent that the majority's speculation were correct, it would make little sense to allow the defense to obtain relief based on an error that the defense invited for its own supposed tactical benefit.

mean that "not only is *Witherspoon* a dead letter, but all substantial evidence review of trial court factual findings is obsolete." Pet. App. 17a n.8. But giving a trial court latitude to reconcile conflicting indications about juror's ability to follow the law does not render appellate review impossible or ineffectual. Nor is there anything improper in recognizing that a juror's "facial expression or body language" might contradict the juror's "spoken words." *Ibid.* If a trial court's removal of a juror rested on observations of the juror's demeanor that cast doubt on the credibility of his otherwise-unimpeachable answers, an appellate court might expect to see some indication of that in the record. But here, where the juror's uncertainty and confusion triggered sustained voir dire by both sides, and formed the basis of an objection by the prosecutor that drew no response from defense counsel, an appellate court fulfills its proper role by deferring to the actors on the scene, rather than imagining for itself a perfectly qualified juror.

c. Contrary to the court of appeals' suggestion, see Pet. App. 13a & n.6, nothing in *Gray* v. *Mississippi*, 481 U.S. 648 (1987), supports requiring a trial court to give dispositive weight to a prospective juror's blanket assertion of an ability to consider a capital sentence. *Gray* principally concerned the question whether harmless-error analysis applies when a prospective juror in a capital case is erroneously excluded for cause. In the course of holding that harmless-error analysis is inapplicable, the Court noted its agreement with the unanimous conclusion of the Mississippi Supreme Court that the juror at issue should not have been excused for cause. See *id.* at 659. The Court did not suggest that the trial court was foreclosed from excusing the juror merely because she had stated that she could impose a capital sentence.

The Court instead operated on the understanding that the trial judge had himself "concluded that [the juror] was capable of voting to impose it," *id.* at 653, but had nonetheless excluded her for cause. Indeed, the Court in *Gray* observed that appropriate voir dire under the state law in question did not accept a blanket assertion of a juror's opposition to the death penalty as a basis for exclusion, but required follow-up questions to discern whether the juror's position was more nuanced. See *id.* at 662-663 & nn.11 & 12. By the same token, a blanket assertion of willingness to impose a capital sentence does not preclude determining that the juror in fact may be unwilling to impose a capital sentence in circumstances authorized by state law based on questioning that shows that his position may be more nuanced.

Gray therefore does not call into question a trial court's basic authority to dismiss a juror for cause notwithstanding the juror's assertion of impartiality, let alone suggest that a trial court must credit such an assertion in the face of other statements that indicate the juror's bias. See *Patton*, 467 U.S. at 1036 (explaining that inquiry into juror bias not only entails determining whether the juror swore "that he could set aside any opinion he might hold," but also requires assessing whether "the juror's protestation of impartiality [should be] believed"). To the contrary, the absence-of-harmless-error rule established by *Gray*—even when the jury ultimately empaneled is free of bias—only underscores the need for deference to a trial judge's reasonable context-based determination. When an error occurs, a new trial on penalty follows. But that remedy should require something more than an appellate court (let alone a habeas court) reaching a different conclusion on a paper record from that reached by the trial court

based on the full context of voir dire. *Witt* demands a degree of deference that the court of appeals did not give. The court of appeals in this case thus erred in concluding that the trial court was bound to conclude that Deal was fit to serve because he had stated that he could impose a capital sentence.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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